IFP motion

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and JOHN MOE, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO DISMISS OR AFFIRM

Appellee, Merrel Cline, moves the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment (Cline v. State of Montana, 546 F.2d 1336 (9th Cir. 1976)) sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I.

QUESTIONS 1 AND 2 HAVE BEEN ANSWERED BY THE FEDERAL COURTS, WITHOUT EXCEPTION, ADVERSELY TO THE APPELLANTS.

Appellants present three questions for review by this Court.

1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

Appellants' contention that the United States Supreme Court's standard [requiring that jeopardy attach upon the swearing and empaneling of the jury, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963)] does not apply to the States is an unsubstantial question. Six Federal Circuit Courts of Appeal, as well as the United States Supreme Court, have applied this standard to State habeas corpus proceedings. To Appellee's knowledge, the Arizona Supreme Court in State v. Padilla, 483 P.2d 549 (Ariz., 1971), cert. den., 404 U.S. 1049 (1972), is the only court in the country other than the Montana Supreme Court to hold that a state is free to determine for itself when jeopardy attaches. This Arizona decision is, of course, of no precedential value in the Federal Court system.

In Breed v. Jones, 421 U.S. 519 (1975), the United States Supreme Court held that the prosecution of the respondent as an adult in California Superior Court, after an adjudicatory finding in juvenile court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the double jeopardy clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment. The United States Supreme Court specifically ruled as to what point in time jeopardy attached.

> "We therefore conclude that the respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when the respondent was 'put to trial before the trier of facts," ibid., that is, when a juvenile court, as the trier of facts, began to hear evidence. See Serfass v. United States, 420 U.S., at 388." Breed v. Jones, supra, at 531.

Although Breed v. Jones involved a judge trial rather than a jury trial, the case is significant because the United States Supreme Court imposed the Federal standard on a California court,

citing Serfass v. United States as authority. The Serfass decision states that in the case of a non-jury trial, jeopardy attaches when the court begins to hear evidence, however, "in the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." See Serfass, supra, at 388.

It is submitted that had Breed v. Jones been a jury trial, the Supreme Court likewise would have cited Serfass and held that jeopardy attached when a jury was empaneled and sworn. In light of Breed v. Jones, the United States Supreme Court has effectively held that the states may not determine for themselves at what time jeopardy attaches and that the Federal standard enunciated in Serfass is not procedural but rather is of constitutional stature.

United States ex rel. Somerville v. State of Illinois, 447 F.2d 733 (7th Cir. 1971), involved a state prisoner's petition for habeas corpus. On remand from the United States Supreme Court, the Seventh Circuit Court of Appeals held that once the state court charge was dismissed on motion of the state, after the jury had been empaneled and sworn, the petitioner was placed in jeopardy and could not again be prosecuted for the same offense. The State of Illinois had argued, precisely as Montana does, that state law was controlling. The Circuit Court stated:

> "The State of Illinois in its brief, supposedly written as an aid to our interpretation of Jorn, contends that Illinois, not Federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court, the case has been remanded for consideration in the light of Jorn and Downum, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of Federal standards (429 F.2d, page 1336). Moreover, the issue has been settled adversely to the state by United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed.2d 300, and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707."

In Smith v. State of Mississippi, 478 F.2d 88, 93 (5th Cir. 1973), the Fifth Circuit Court of Appeals cited Downum

v. United States, 372 U.S. 734 (1963), and Illinois v. Somerville, 410 U.S. 458 (1973), stated, "In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn."

Other cases involving state prisoner habeas corpus petitions in which Federal Circuit Courts of Appeal have applied the Federal standard as to the attaching of jeopardy are: United States ex rel. Rogers v. LaValle, 517 F.2d 1330, 1333 (2d Cir. 1975); Whitfield v. Warden of Maryland, 486 F.2d 1118, 1122 (4th Cir. 1973); Thomas v. Beasley, 491 F.2d 507, 508 (6th Cir. 1974); United States ex rel. Gibson v. Ziegele, 79 F.2d 773, 776 (3rd Cir. 1973).

Appellee knows of no Federal decisions which allow the state courts to impose a different standard as to the attaching of jeopardy. The Federal Courts which have addressed the issue are in complete agreement and thus there is no need for further argument. Appellee submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

II.

THE FEDERAL STANDARD AS TO THE ATTACHING OF JEOPARDY IS NOT A FEDERAL RULE OF CRIMINAL PROCEDURE

On page 7 of their jurisdictional statement, Appellants state:

> "Appellants submit that the judgment below presents substantial questions warranting the acceptance of this action. The Ninth Circuit Court of Appeals opinion rules that it is constitutionally impermissible for the separate states to establish rules governing when jeopardy attaches which vary in any degree past the time established in the Federal Rules of Criminal Procedure."

This characterization of the issue as involving a Federal Rule of Criminal Procedure is entirely inaccurate.

The requirement that jeopardy attach upon the swearing and empaneling of the jury is not a rule of criminal procedure but, rather, is a pronouncement by the United States Supreme Court

in its substantive interpretation of the Fifth Amendment Double Jeopardy Clause. Serfass v. United States, 420 U.S. 377 (1975).

Contrary to Appellants' contentions, the standard as to the attachment of jeopardy cannot be likened to the Supreme Court's holding that the states may have juries of less than twelve persons, Williams v. Florida, 399 U.S. 78 (1970), nor to the Supreme Court ruling that the states need not require unanimous jury verdicts. Apodaca v. Oregon, 406 U.S. 404 (1972).

The United States Supreme Court has specifically held that both the twelve man requirement and the unananimity requirement are not of constitutional stature and therefore are not obligatory upon the states. The standard as to the attaching of jeopardy, however, is of constitutional stature and has been consistently applied to the states by the Federal courts.

III.

APPELLANTS' ISSUE #3 IS NOT WITHIN THE JURISDICTION OF THIS COURT AND SHOULD BE DISMISSED

Appellants' third issue presented on appeal is as follows:

> "Assuming that this court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?"

The question of "manifest necessity" does not involve a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution of the United States and, therefore, this question is not within the United States Supreme Court's jurisdiction over appeals pursuant to 28 U.S.C., §1254(2). Further, Appellants' jurisdictional statement contains no citations of authority which would suggest that this Court has jurisdiction, on appeal, over Issue No. 3.

Appellee respectfully submits that Issue No. 3 is not within the jurisdiction of this Court and should therefore be dismissed pursuant to Rule 16.1(a).

CONCLUSION

Appellee respectfully submits that:

1. It is manifest that Appellants' questions #1 and #2 on which the decision of this cause depends are so unsubstantial as not to need further argument, and thus the judgment of the Circuit Court should be affirmed.

2. Appellants' question #3 is not within this Court's jurisdiction over appeals pursuant to 28 U.S.C., §1254(2), and therefore said question should be dismissed.

Respectfully submitted this 14th day of March, 1977.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 14th day of March, 1977.

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